

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

STEVE AZBILL,

Case No. 07-6375-HO

Plaintiff,

ORDER

v.

Commissioner of Social Security,

Defendant.

Plaintiff filed this action for review of the decision of the Commissioner that plaintiff ceased to be disabled as of April 14, 2004. The Commissioner's decision is supported by substantial evidence and free of material legal error, and is therefore affirmed.

Discussion

Plaintiff fails to demonstrate good cause to remand this matter to the administrative law judge to consider the November 27, 2007 letter opinion of Dr. Stricker that plaintiff is disabled by chronic Lyme disease. (Tr. 7-8, 11-12). Plaintiff's only explanation for not timely submitting Dr. Stricker's

opinions is that plaintiff is not an attorney. Moreover, this evidence is not material because there is not a reasonable possibility that it would change the outcome. The ALJ rejected the Lyme disease diagnoses of several physicians, including Dr. Stricker, based on their reliance on plaintiff's statements, the absence of supporting objective medical evidence and the opinion of Dr. Kane. (Tr. 49). As discussed below, the ALJ rejected plaintiff's allegations of disabling symptoms because he found plaintiff incredible. (Tr. 51). Dr. Stricker's November 27, 2007 letter opinion is not supported by objective medical evidence proving that plaintiff is disabled by Lyme disease.

The ALJ stated clear and convincing reasons supported by substantial evidence to reject plaintiff's statements about the effects of his impairments. The ALJ noted that plaintiff has taken very little treatment for depression despite his allegations of severe depression. (Tr. 51). The ALJ asked plaintiff if he had counseling and plaintiff responded that he continued to take Wellbutrin. (Tr. 692). Plaintiff acknowledged that he had asked to be taken off Wellbutrin, but that his wife decided that he was irritable without it, and in plaintiff's opinion, such a minor issue did not warrant scheduling time to see a doctor. (Tr. 692). The ALJ provided plaintiff with the opportunity to explain the sparse treatment record with respect to depression. He was not obliged to accept plaintiff's

explanations. The ALJ therefore properly relied on the treatment record in determining the credibility of plaintiff's statements regarding symptoms of depression. In his brief, plaintiff points to reasons someone might not take treatment for depression. Plaintiff does not argue that the reasons apply to his situation, however. The ALJ properly relied on Dr. Novie's March 19, 2004 report that plaintiff stated in 2001 that he felt well enough to work and did not feel right taking benefits at that time, and Dr. Novie's opinion that plaintiff has no mental disorders and fair or better functional capacities. (Tr. 48-49, 459-60).

Next, the ALJ properly considered the results of a June 9, 2006 treadmill exam for palpitations showing average functional capacity for an active person. (Tr. (Tr. 51, 529). The ALJ properly found that allegations of severe dysfunction are contradicted by the record. (Tr, 51). Whereas plaintiff stated that joint pain in his hands can make turning a page a problem, plaintiff further stated that he takes care of, acts as a father to, and prepares meals for his eight-year old grand daughter, who lives with him. (Tr. 50-51, 694-96). Plaintiff cares for the child while the child's mother and grandmother are at work. Id. As the ALJ noted, plaintiff can spend several hours per day using the computer to learn web page design, plaintiff does some household chores, plaintiff drives a car, and plaintiff engages in essentially normal daily activities. (Tr. 50-51, 694-696).

Plaintiff's activities do not necessarily prove that he can engage in competitive work, but the ALJ permissibly found them inconsistent with the severity of symptoms alleged by plaintiff.

Review of the medical evidence confirms the ALJ's finding that plaintiff takes little in the way of medication despite allegations of disabling depression and pain. (Tr. 51).

Plaintiff's wife wrote that plaintiff has a poor memory, forgets everything, cannot remember instructions, burns pans when he cooks, cannot hold anything, is in a great deal of pain, has good days and bad days and some days cannot swallow, and that no employer would tolerate plaintiff's limitations. (Tr. 51, 291-94). The ALJ properly rejected plaintiff's wife's statements. The ALJ reasoned that leaving a child in the care of a person with the limitations stated by plaintiff's wife would be unsafe, and the limitations are not found in the medical records reviewed by Dr. Kane, nor are they confirmed by the exhaustive testing and evaluation ordered by Dr. Kane in attempt to find a cause for plaintiff's complaints. (Tr. 51, 529-604).

Finally, the ALJ properly considered that the allegations of severe dysfunction are not supported by the objective evidence in the record. (Tr. 51).

Plaintiff disputes the ALJ's reliance on Dr. Kane's opinion that plaintiff has fibromyalgia, rather than chronic Lyme disease. Nevertheless, medical evidence demonstrates medical

improvement in plaintiff's impairments at the time of the comparison point decision, that is, depression, Lyme disease and esophageal dysfunction. 20 C.F.R. § 404.1594; (Tr. 49). Based on review of the medical evidence and tender point testing, Kaiser Foundation doctors determined in the first half of 2006 that the Lyme disease diagnoses were not warranted, and that plaintiff has fibromyalgia. (Tr. 559-61, 568, 590, 594). Dr. Novie found plaintiff's memory functions to be average to superior with no score as low as previous testing, and no mental disorders. (Tr. 48-49, 459). Over a period of years, plaintiff reported improved GI symptoms and decreasing dysphagia and esophageal reflux. (Tr. 49, 593). One month prior to the comparison point decision, plaintiff weighed 135 lbs, down from 185 lbs and up from a low of 122 lbs. (Tr. 349). Plaintiff weighed 180.5 lbs two months before the date the ALJ determined that his disability ceased. (Tr. 426).

The ALJ's determination of plaintiff's residual functional capacity as of April 14, 2004 is supported by substantial evidence. As noted, the ALJ permissibly rejected the lay evidence and the RFC determination is supported by the opinions of consulting doctors. (Tr. 49, 461-83). Therefore, the ALJ properly determined that medical improvement is related to plaintiff's ability to work. 20 C.F.R. § 404.1594.

Because plaintiff's current RFC is supported by substantial

evidence, the ALJ's hypothetical question to the vocational expert is complete and the ALJ's determination that plaintiff can return to his past relevant work is supported by substantial evidence.

Conclusion

Based on the foregoing, the decision of the Commissioner is affirmed.

SO ORDERED.

DATED this 5th day of May, 2009.

s/ Michael R. Hogan
United States District Judge